87-2025

No._____

IN THE

Supreme Court of the United States

October Term, 1987

ROBERT PEREZ,
Petitioner,

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Ohio

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I.

QUESTION PRESENTED FOR REVIEW

The *Anderson v. Liberty Lobby* standard does not, and should not, supplant Ohio Rule of Civil Procedure 56 so as to deny this Petitioner his constitutional right to a jury trial and open access to the courts.

II.

PARTIES BELOW

The parties below include respondents Scripps-Howard Broadcasting Company, a corporation which owns and operates the television station WEWS in Cleveland, Ohio, and Bill Younkin, a reporter employed by station WEWS.

Edward Ferren was a defendant in the trial court but is not a respondent.

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CITATIONS TO OPINIONS BELOW

The citation to the decision of the Ohio Supreme Court is *Perez v. Scripps-Howard Broadcasting Co.* (1988), 35 Ohio St. 3d 215, set forth in the Appendix at pp. A1-A19. The decision of the Stark County Court of Appeals is unreported and is set forth in the Appendix, *infra*, at pp. A20-A34. The written decision of the trial court is set forth in the Appendix, *infra*, at pp. A37-A40.

JURISDICTIONAL STATEMENT

Petitioner, Robert Perez, prays that a Writ of Certiorari issue to review the judgment of the Ohio Supreme Court entered on March 9, 1988, which reversed the Judgment of the Court of Appeals and reinstated the Judgment of the Trial Court.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION:

§16 [Redress in courts.]

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law. (As amended September 3, 1912.)

OHIO RULE OF CIVIL PROCEDURE 56.

See, Appendix at pp. A43-A45.

STATEMENT OF THE CASE

A. Summary of Procedural History.

On October 31, 1980, Robert Perez filed a Complaint in the Court of Common Pleas of Stark County, Ohio against the following Defendants:

Scripps-Howard Broadcasting—a corporation which owns and operates Television Station WEWS in Cleveland, Ohio, and,

Bill Younkin—a "reporter" employed by Television Station WEWS.

The Complaint of the Petitioner, Robert Perez, alleges that the Respondents, Scripps-Howard Broadcasting and Bill Younkin defamed the reputation of the Petitioner in a series of broadcasts aired September 4, 10, 24, 25, 26, and October 7, and 17 of 1980. During the broadcasts, the Respondents accused the Petitioner, Robert Perez, a Captain in the Stark County Sheriff's Department and one of the founders of the Stark County Metropolitan Narcotics Unit, a special task force set up to combat the use and trafficking in illegal narcotics, with having been a participant in an illegal conspiracy to distribute illegal drugs.

The chief source of the material which was broadcast over the airwaves, other than the defamatory and derogatory comments of the "reporters", were videotaped and edited interviews of one Edward Ferren, an admitted drug trafficker.

The Respondents filed a Motion for Summary Judgment, supported by the Affidavit of Bill Younkin.

The Petitioner responded to the Motion for Summary Judgment by filing a Memorandum in Opposition to the Motion, along with the Affidavit of Robert Perez which incorporated the deposition of Edward Ferren, taken previously by the parties.

The Trial Court ruled that the Petitioner was a "public official" within the meaning of the law, and further found "*no* evidence that may be construed to show that the alleged false statements were made with a 'high degree of awareness of their probable falsity.' ". Therefore, the Trial Court granted Summary Judgment in favor of the Respondents.

From this Judgment, the Petitioner filed his Notice of Appeal to the Court of Appeals for Stark County, Ohio, Fifth Appellate District.

In the Court of Appeals, the Petitioner, Robert Perez, assigned two errors by the Trial Court. They are as follows:

FIRST ASSIGNMENT OF ERROR:

> The Trial Court committed reversible error when it determined as a matter of law that the Plaintiff-Appellant, Robert Perez, a deputy in the Stark County Sheriff's Department was a "public official".

SECOND ASSIGNMENT OF ERROR:

> The Trial Court committed reversible error when it granted Summary Judgment to the Defendants-Appellees, Scripps-Howard Broadcasting and Bill Younkin where the pleadings, depositions, affidavits, and other documentary material filed in the record establish genuine issues of material fact which are in dispute and where the Defendants-Appellees were not entitled to a judgment as a matter of law.

The Court of Appeals for Stark County, Ohio affirmed the Judgment of the Trial Court that the Petitioner was a "public official", but reversed the judgment of the Trial Court that the Respondents were entitled to Summary Judgment.

The record from the Court of Appeals as reflected in their Opinion is clear that the Court of Appeals examined the record which was before the Trial Court at

the time of the consideration of the Motion for Summary Judgment, and found that "reasonable jurors could conclude that actual malice appears with convincing clarity." (Opinion of the Court of Appeals: Appendix at A33).

From this Judgment of the Court of Appeals of Stark County, Ohio, the Respondents, Scripps-Howard Broadcasting and Bill Younkin, filed their appeal to the Supreme Court of Ohio.

The Ohio Supreme Court held that the inquiry into actual malice in a public official defamation case should focus on the publisher's attitude toward the truth rather than upon the publisher's attitude toward the plaintiff and that summary judgment is properly granted for the defendant where no genuine issue of fact exists on the question of whether the publication was made with a high degree of awareness of its falsity. On this basis, the Supreme Court reversed the judgment of the Court of Appeals and reinstated the Summary Judgment granted at the trial level in favor of the Respondents.

B. Statement of Fact.

During the early 1970's, the Petitioner was one of the first members of the Stark County Metropolitan Narcotics Unit, a special local law enforcement unit designed to combat the proliferation of illegal drug usage, which was begun under the control of David Dowd (at that time a "Federal Advisor", since then, a Justice of the Supreme Court of Ohio, and presently a Judge of the Federal Court for Northern Ohio) (R. at 67).

The first contact that the Petitioner had with Edward Ferren was while Edward Ferren was incarcerated in the Stark County Jail for a misdemeanor offense filed by the police department of the Village of Minerva, Ohio (R. at 94).

Following the sentencing of Edward Ferren upon the misdemeanor charge, the Petitioner spoke to Edward Ferren on three occasions at the Stark County Jail (R. at 96). The Petitioner spoke to Edward Ferren for the express purpose of inducing Edward Ferren to work for the Stark County Metropolitan Narcotics Unit as an "undercover agent" (R. at 96). Of the three interviews that the Petitioner had with Edward Ferren, the first interview (according to the deposed testimony of Robert Perez), there were present, Ferren, Ferren's mother, officer Jim Nelson of the Village of Minerva Police Department, and Perez; on the second occasion, Perez and Ferren were present; and on the third occasion, Perez, Ferren, and Ferren's mother were present (R. at 103).

Ultimately, Captain Perez decided that Edward Ferren, despite his knowledge of the sources and routes that certain narcotics traveled into Stark County, was too unstable to be effectively used as an undercover informant (See, R. at 102, 103).

Beginning in September of 1980, the Respondents, Scripps-Howard Broadcasting (Station WEWS), and Bill Younkin broadcast a series of television reports accusing Robert Perez of, among other offenses, attempting to recruit Edward Ferren to distribute illegal narcotics.

Captain Perez admits, in his deposition that he refused several telephone calls from Bill Younkin after the televised reports were aired, but also testified that:

> On one occasion, it was myself and two other deputies, we accepted to talk to him. We told him (Younkin) what he wanted to know. Yet when he got done, he didn't believe a damn word that we told him and he went back to the TV and told them just the opposite.

(R. at 115, 116).

During the period from September 10, 1980, when the first televised report was aired, and the date of the general election in November, 1980, the election between the incumbent Sheriff, George Papadopoulos, and Robert Berens was hotly contested.

During the deposition of Robert Perez, when questioned as to the motivation of Bill Younkin in pursuing the television reports, Captain Perez stated:

> Q. Well, why do you think that Younkin was involved in the politics, if I read you correctly?
>
> A. That's correct. You are reading it correct. It was strictly politics. What he had to gain, I don't know. The stories were out at that time that he was related to the sheriff.
>
> Q. To Berens?
>
> A. To Berens. That's the story come back to us. He is related to the sheriff. Of course, we done some homework, too, and we couldn't find that. But he definitely traveled with the sheriff. The sheriff would call him on any little incident—not the sheriff—the present sheriff Berens would call him on anything that was going on. . .

(R. at 166).

All of the foregoing statement of facts was taken from the deposition of Robert Perez (R. from 44 to 179).

On September 25, 1980, the Defendant Scripps-Howard Broadcasting (Station WEWS) and Bill Younkin participated in the following televised report:

> Mr. Maynor: For the past several days Bill Younkin has been putting together another puzzle, *this one linking men behind the badges and their own illegal drug business.* Tonight he is here for the startling finale of this series.

> Mr. Younkin: Ed Ferren used to deal heavily in drugs. But like many others I have talked with, he was never convicted of any drug law violations in Stark County.
>
> A couple of years ago he was in the Stark County Jail following a New Year's prank. During his stay in jail, he tells me Captain Robert Perez had him taken out of his cell and into Perez' office.
>
> Mr. Ferren: He proposed that I, you know, sell drugs.
>
> Mr. Younkin: As an undercover agent?
>
> Mr. Ferren: Never mentioned being undercover. He never mentioned nothing about being a cop. He just wanted me to do drugs. He just said, "I want you to do the runs between here and Michigan."

(R. at 275), and further in the same report, Bill Younkin stated as follows:

> . . . One top officer for the Stark County Metropolitan Narcotics Agency would neither confirm nor deny what you have heard the past couple of days, allegations that top Sheriff Deputies were involved in their own illegal drug deals. He paused and said, "You must do what you have to do."

(R. at 277).

In his Affidavit in opposition to the Motion for Summary Judgment, the Petitioner stated:

> That while Ed Ferren was in Jail he interviewed him with the knowledge of his father and stepmother to determine if he could assist the Metro group by acting as an informant to affiant or other persons in law enforcement.

(R. at 290).

Ferren testified that Younkin interviewed him three times.

Ferren further testified:

A. Yes. He almost knew everything, but he didn't know one or two little details, which I told Younkin I talked to Perez three times. The second time I talked to Perez I was sitting in lockup and my mother and my stepfather were there.

Q. Okay.

A. And Bob was talking to me about being a cop, and I told him—

Q. You're talking about Bob Perez?

A. Yeah.

Q. Okay.

A. About being a police officer, and I told him I couldn't handle that and I didn't want—

Q. You mean as an undercover agent?

(R. at 303).

Ferren further testified:

A. Yes. He told me that I could wheel and deal out on the street for him. And I conveyed this conversation as best I could to Mr. Younkin after we rehearsed it three or four times.

Q. Now, wait a minute. You said you could work there for him, and, of course, he meant that you were to work as an undercover agent?

A. He never mentioned nothing the third time about an undercover job.

Q. I see. But the second time he said I'll give you a badge and make you an undercover agent; right?

A. Yes. I told Mr. Younkin that, and that part was left out.

Q. He never put that on there?

(R. at 304).

Edward Ferren further testified that during the interview, there was an outside security man, sitting in a car in the parking lot, and that the outside security man was Robert Berens, the candidate for Sheriff (R. at 306, 307).

Edward Ferren further testified:

> Q. Now let me ask you this. You did three interviews there?
>
> A. Well two of them were without tape. It was like we were just sitting there, and he kept saying we have to cut this down, and can you use a different word?
>
> Q. In fact, you rehearsed it two times?
>
> A. Yes.
>
> Q. And didn't he tell you that you can't make it a little stronger, words to that effect?
>
> A. Yes. Even when I called him up a couple times on the phone because I was having problems down here, I'd say something on the phone; and he'd say well, can't you say it differently.
>
> Q. Indicating that he wanted you to say it stronger and make more specifics?
>
> A. Uh-huh . . .

(R. at 307, 308).

In addition, Edward Ferren testified at his deposition that he had told Bill Younkin that he could not prove what happened during the interviews with Capt. Perez (R. at 308).

Further, Edward Ferren testified that Bill Younkin told him that if the television reports resulted in a lawsuit being filed that Edward Ferren would be taken care of and that they would pay his legal fees (R. at 310).

Edward Ferren was adamant in his testimony at deposition that he told Bill Younkin that Robert Perez had approached him during at least two of the interviews at the Stark County Jail and wanted Edward Ferren to act as an undercover agent for Metro (R. at 313, 315).

Further, Edward Ferren testified that following the interview between Bill Younkin and Edward Ferren, Sam Sainer gave Edward Ferren two "elect Berens" posters (R. at 318).

In his affidavit, Robert Perez stated that the interview of Edward Ferren did not establish that Edward Ferren would be helpful as an informant, and that he was not retained as an informant by Metropolitan Narcotics (R. at 290).

REASONS FOR GRANTING THE WRIT

THE *ANDERSON V. LIBERTY LOBBY* STANDARD DOES NOT, AND SHOULD NOT, SUPPLANT OHIO RULE OF CIVIL PROCEDURE 56 SO AS TO DENY THIS PETITIONER HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL AND OPEN ACCESS TO THE COURTS.

Looking at the forceful language of the Ohio Constitution on the right to trial and the accessibility of the courts and their processes, there is no question but that a public-figure libel litigant possesses the guaranteed right to a full and fair adjudication of his claim.

> Art. I, §16. Redress in Courts.
>
> All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

The petitioner, Robert Perez, is entitled to litigate his claim beyond the summary judgment stage and to present his case to a jury, since serious triable issues exist.

In Ohio, the summary judgment rule, which sets forth the guidelines for the motion and the proceedings thereon, is Rule 56 of the Ohio Rules of Civil Procedure. Its terms are substantially identical to those of Federal Rule 56. Consequently, the analysis used by the Court when determining whether to grant or deny said motion

is the same at the federal as well as the state level. A motion for summary judgment should be granted only when:

(1) There is no genuine issue of material fact;

(2) The movant is entitled to judgment as a matter of law; and

(3) Reasonable minds could conclude only in favor of the movant after construing the evidence most strongly in favor of the non-movant.

Harless v. Willis-Day Warehousing Co. (1978), 53 Ohio St. 2d 64; *Temple v. Wean* (1977), 50 Ohio St. 2d 317.

The above-cited rule, and the standards for its application, have not been altered by *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. _____, 91 L. Ed. 2d 202. Rather, that case is illustrative of the operation of the summary judgment motion in the context of a public-figure libel action.

Thus, even in the post-*Liberty Lobby* era, the summary judgment method should be exercised with caution, especially when the Court is probing the state of mind of the defamation defendant. In *Varanese v. Gall* (1988), 35 Ohio St. 3d 78, 80, the actual malice standard is spelled out as follows:

> A defamation plaintiff who is required to show actual malice must demonstrate, with convincing clarity, that the defendant published the defamatory statement either with actual knowledge that the statement was false, or with a high degree of awareness of its probable falsity.

Poller v. Columbia Broadcasting System (1962), 368 U.S. 464; *Hutchinson v. Proxmire* (1979), 443 U.S. 111; and *Bukky v. Printing Co.* (1981), 68 Ohio St. 2d 45 recognize

that the trial court's probe of a summary judgment motion in a public-figure defamation case is subjective, and therefore, risk-laden.[1]

In the instant matter, too, the summary judgment motion is an inappropriate vehicle for assessing liability. Genuine issues exist as to the state of mind of the Defendant-Respondent, reporter William Younkin. At the Court of Appeals level of this case, Presiding Judge Norman J. Putman, of the Fifth Appellate District in Stark County, Ohio, enumerated some of the disputed issues this way:

1. Did the entirety of the Perez-Ferren conversations as told to Younkin by Ferren show nothing more than Perez attempting to recruit Ferren to work "undercover" as a law enforcement agent?

---

[1] (a) We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation *where motive and intent play leading roles.* (Emphasis added.) *Poller v. Columbia Broadcasting System* (1962), 368 U.S. 464, 473.

(b) Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called "rule". The proof of "actual malice" calls a defendant's state of mind into question, *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A.L.R.2d 1412 (1964), and does not readily lend itself to summary disposition. *Hutchinson v. Proxmire* (1979), 443 U.S. 111, 120, fn. 9.

(c) First, recent precedent of the United States Supreme Court has sounded a note of caution with respect to granting summary judgment in First Amendment libel cases. Where a reporter's or editor's "state of mind" or "subjective awareness of probable falsity," motion or intent is the focal point of the case, the court has expressed some doubt as to the propriety of rendering summary judgment. *Bukky v. Printing Co.* (1981), 68 Ohio St. 2d 45, dissent at 49.

2. Did Younkin believe that if he told the whole story, there would be "no news"?

3. Did Younkin, in his broadcast, take away the context and surrounding circumstances from the third Perez-Ferren interview intending thereby to alter the meaning of the spoken words from innocence to guilt?

4. Did Younkin conceal the Sainer-Berens part of the story because he believed it would show a motive to falsify, thus impairing the credibility of his report?

It cannot be denied that these questions require an examination of Mr. Younkin's thought processes and attitudes toward the truth of his report. The summary judgment procedure cannot, and does not, provide that degree of exploration.

The summary judgment rule, Rule 56, provides that certain items of documentary evidence may be considered by the Court, *i.e.*, pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact. Petitioner Perez made allegations in his complaint (Appendix at A46-A51), and repeated them upon oral deposition, to the effect that false statements were "known to be untrue or with proper inquiry would have been found to be false and were deliberately made by defendant Younkin . . ." In his affidavit, Younkin countered by denying wrongdoing and insisting that he believed the witness, Ferren, and fairly and accurately reported the criminal charges against Captain Perez (Appendix at A52-A53). Surely, this self-serving affidavit is not sufficiently probative to outweigh the Plaintiff-Petitioner's deposition. In a summary

judgment proceeding, the defendant's profession of good faith does not "automatically" guarantee that he will prevail. *St. Amant v. Thompson* (1968), 390 U.S. 727.

> [7] The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.[3]

Id. at 732.

The particulars of this case militate against a resolution through a summary judgment motion. Reporter Younkin obtained his story through an informant—one Ed Ferren. Undoubtedly, since Ferren is a drug dealer, he would have reason to seek to sabotage law enforcement efforts to crack down on trafficking. Again, the spotlight is on the mindset of the publisher/reporter who relies upon the word of an informant. *Id.* If the veracity of the informant can be questioned, then the awareness of the defendant must be scrutinized. *Id.* at 731. Such functions are more fitting for the jury than for a judge in a purely paper process. A jury observes a witness and hears his voice—making that jury most capable of assessing demeanor and credibility.

Through the deposition of the informant, it was revealed to the Petitioner that Ferren's version of the events was altered for purposes of publication. That is to say the "editorial process" encompassed an unusual amount of cutting and piecing of the story. This internal decision-making bears upon the existence in the publisher's mind of the requisite awareness of probable falsehood. *Herbert v. Lando* (1979), 441 U.S. 153, 172. A triable issue is present if the editorial selection of one version over another exhibited "actual malice" within the meaning of that term in Ohio defamation law.

CONCLUSION

Based upon the foregoing, the writ should be granted.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided March 9, 1988)

No. 87-34

THE SUPREME COURT OF OHIO

Columbus

ROBERT PEREZ,
Appellee,

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY, *et al.*,
Appellants.

[Cite as Perez v. Scripps-Howard Broadcasting Co. (1988), 35 Ohio St. 3d 215.]

Defamation—Public official as plaintiff—Focus is on publisher's attitude toward the truth rather than toward the plaintiff—Summary judgment properly granted, when.

O.Jur 3d Defamation §41.

1. The inquiry into actual malice in a public-official defamation case should focus on the publisher's attitude toward the truth rather than upon the publisher's attitude toward the plaintiff.

2. In a public-official defamation case, summary judgment is properly granted for the defendant where no genuine issue of fact exists on the question of whether the publication was made with a high degree of awareness of its falsity.

Appeal from the Court of Appeals for Stark County.

The appellee, Robert Perez, filed a libel action against appellant Scripps-Howard Broadcasting Company, which owns and operates television station WEWS, Channel 5 in Cleveland, Ohio, and appellant William Younkin, a reporter for the station. The complaint arose from a series of televised, investigative reports which plaintiff claimed represented that Perez, then a captain in the Stark County Sheriff's Department, seized illegal narcotics, resold them on the streets and solicited a drug dealer to sell drugs for him.

In the summer of 1980, a heated political campaign for the office of Stark County Sheriff pitted George Papadopulos, the incumbent, against Robert Berens, a deputy. Deputy Sheriff Sam Sainer, who was apparently campaigning for Berens, told Younkin that he could introduce him to people who might establish a link between the sheriff's department and the sale of illegal drugs. Sainer had been a reliable source of information in the past. A meeting was arranged between Younkin, Sainer and several individuals.

As a result of the meeting and other investigations, WEWS broadcast the following report on September 25, 1980, during the 11:00 p.m. edition of the news:

> "Mr. Maynor: For the past several days Bill Younkin has been putting together another puzzle, this one linking men behind the badges and their own illegal drug business. Tonight he is here for the startling finale of this series.

"Mr. Younkin: Ed Ferren used to deal heavily in drugs. But like many others I have talked with, he was never convicted of any drug law violations in Stark County.

"A couple of years ago he was in the Stark County Jail following a New Year's prank. During his stay in jail, he tells me Captain Robert Perez had him taken out of his cell and into Perez' office.

"Mr. Ferren: He proposed that I, you know, sell drugs.

"Mr. Younkin: As an undercover agent?

"Mr. Ferren: Never mentioned being undercover. He never mentioned nothing about being a cop. He just wanted me to do drugs. He just said, "I want you to do the runs between here and Michigan.'

"Mr. Younkin: For him?

"Mr. Ferren: That's what he was asking. He didn't ask me to do it for myself. I was already in custody.

"Mr. Younkin: He actually said 'the runs, make the runs'?

"Mr. Ferren: He knew the same runs I did. He mentioned the same people I knew between Canton, Ohio and Michigan. And even was talking about between Canton and Columbus. He knew the same runs, he knows the same people. Only he might not know the exact same people but he knows the same connections.

"Mr. Younkin: And he actually said to you, 'I want you to make the runs'?

"Mr. Ferren: Yeah. He told me, he said—he didn't talk about nothing about being a cop. He's just talking about doing drugs out on the streets.

"Mr. Younkin: And wheeling and dealing?

"Mr. Ferren: Yes. He told me, he says, 'Set you up and you can wheel and deal,' he says, 'but you'd be working for me.'

"Mr. Younkin: Captain Robert Perez wouldn't even give me a chance to ask him about the Ferren charge. Captain Perez hung up.

"Assistant Prosecutor Sanders Mastel refused to answer my phone calls. The same can be said for Stark County Sheriff George Papadopulos who[m] I have been calling for the past two weeks and whose secretary told me she is sure her boss got the message.

"One top officer for the Stark County Metropolitan Narcotics Agency would neither confirm nor deny what you have heard the past couple of days, allegations that top Sheriff Deputies were involved in their own illegal drug deals. He paused and said, 'You must do what you have to do.'

"Mr. Henry: Bill, as is the case with all of your reports, this is raising still more questions.

"Mr. Younkin: Many more questions tonight.

"Mr. Henry: Thank you."

After the broadcast, Sheriff Papadopulos appointed five deputies to investigate Ferren's allegations. Subsequently, the sheriff's department issued a press release stating that the board of inquiry had cleared Perez and that the department considered the case closed. On October 17, 1980, WEWS reported the board's determination:

"Mr. Henry: Stark County Sheriff's Captain Robert Perez has been cleared, he has been cleared of charges made here that he asked a man to peddle drugs for him. At least that's what a board of inquiry says. Bill Younkin has the report.

"Mr. Younkin: In a prepared news release, Stark County Sheriff George Papadopulos has announced that his special board of inquiry, made up of his own deputies, can find no basis for the allegations raised in our probe of his department.

"Ed Ferren, an admitted former drug dealer, said one of Sheriff Papadopulos' top officers was involved in his own drug deals. Ferren told me he was in the Stark County Jail when Captain Robert Perez offered him a deal to make the drug runs for him, Captain Perez.

"According to the Sheriff's news release, the five member panel could find no one who could name Perez, even though they did talk with Ed Ferren. I talked with Ferren by phone this afternoon, he told me he never changed his story at all.

"Mr. Ferren: I'm just telling you, man, I stand by what I said.

"Mr. Younkin: The Sheriff questioned my source's credibility and he says he considers the case closed.

"I'm Bill Younkin, TV-5 Eyewitness News."

After extensive discovery, appellants filed a motion for summary judgment, supporting the motion with an affidavit by Younkin which detailed his investigation of Ferren and of Ferren's charges. Younkin described his futile efforts to contact Perez and other departmental officers for a response to Ferren's statements. Younkin professed his belief in Ferren's credibility and claimed that the charges concerning Perez were fairly and accurately reported.

Perez countered by affidavit, stating that as a member of a special unit to eliminate drug trafficking in Stark County, he had talked to Ed Ferren about drug sources in Columbus and Michigan. Perez decided that

Ferren could not be helpful as an informant and the discussion between the two was not followed by further action. Perez did not deny the specific statements made by Ferren on the WEWS broadcast. Instead, Perez attached Ferren's deposition to his affidavit, saying: "a casual examination of this deposition shows it [the interview] was not only done with reckless disregard but with actual malice."

In the deposition, Ferren said he talked to Perez three times. During the first two meetings, Perez asked Ferren to work as an undercover agent. However, at the third meeting, Perez did not mention working undercover. Ferren told Younkin about the earlier solicitations to work as an undercover agent. That part of his story was omitted from the broadcasts. Nor were all portions of the taped interview put on the air. In addition, Younkin rehearsed Ferren two or three times before taping, asked him to re-phrase some statements, told him to make his charges stronger, and offered to pay his fees in the event legal problems arose from the broadcast.

The trial court granted summary judgment, holding that Perez was a public official and that a jury, acting reasonably, could not find actual malice with convincing clarity.

The court of appeals reversed and remanded, finding a genuine dispute as to five material facts:

> "1. Did the entirety of the Perez-Ferren conversations as told to Younkin by Ferren show nothing more than Perez attempting to recruit Ferren to work 'undercover' as a law enforcement agent?
>
> "2. Did Younkin believe that if he told the whole story, there would be 'no news'?

"3. Did Younkin, in his broadcast, take away the context and surrounding circumstances from the third Perez-Ferren interview intending thereby to alter the meaning of the spoken words from innocence to guilt?

"4. Did Younkin conceal the Sainer-Berens part of the story because he believed it would show a motive to falsify, thus impairing the credibility of his report?

"5. Did Younkin intend unjustifiably to injure the reputation of Perez so as to destroy Sheriff Papadopulous [*sic*] and elect Robert Berens Sheriff?"

The cause is before this court pursuant to the allowance of a motion to certify the record.

Harry W. Schmuck and *James P. Adlon*, for appellee.

Baker & Hostetler, Louis A. Colombo and *Charles E. Jarrett*, for appellants.

HERBERT R. BROWN, *J.* This case calls upon us to decide whether summary judgment was properly entered against the plaintiff in a public-official defamation case. For the reasons which follow, we find that it was.

I

The law of defamation has been given much attention by the federal courts and by this court. Rather than repetitiously plough old ground, we think it sufficient to sketch the law which serves as the foundation on which this case must be decided.

New York Times Co. v. Sullivan (1964), 376 U.S. 254, 279-280, "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was

false or not." The proof of actual malice must be clear and convincing. *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, 342. In making that measurement, the focus is upon the defendant's attitude toward the truth or falsity of the published statements, rather than upon the existence of hatefulness or ill will. *Garrison v. Louisiana* (1964), 379 U.S. 64, 74; *Herbert v. Lando* (1979), 441 U.S. 153. The plaintiff's burden is to show with convincing clarity that: (1) the false statements were made with a high degree of awareness of their probable falsity, *Garrison, supra,* at 74, or (2) the defendant entertained serious doubts as to the truth of the publication, *St. Amant v. Thompson* (1968), 390 U.S. 727, 731. On appeal, the appellate court must exercise its independent judgment in deciding whether the evidence of record meets these tests. *Bose Corp. v. Consumers Union of United States, Inc.* (1984), 466 U.S. 485, rehearing denied (1984), 467 U.S. 1267.

On these basic principles, the law of Ohio and federal law are in accord. *Grau v. Kleinschmidt* (1987), 31 Ohio St. 3d 84, 31 OBR 250, 509 N.E. 2d 399; *Scott v. News-Herald* (1986), 25 Ohio St. 3d 243, 25 OBR 302, 496 N.E. 2d 699; *Dupler v. Mansfield Journal Co.* (1980), 64 Ohio St. 2d 116, 18 O.O. 3d 354, 413 N.E. 2d 1187, certiorari denied (1981), 452 U.S. 962.

II

It is against this history of First Amendment protection that we review the summary judgment granted in favor of the defendants.

Neither we nor the trial court may weigh the proof or choose among reasonable inferences in deciding whether summary judgment should be granted. As in other civil cases, inferences and questions of credibility must be resolved in plaintiff's favor. *Dupler, supra.*

Nonetheless, summary judgment remains an especially appropriate procedure by which First Amendment issues are resolved. *Dupler, supra*, at 120, 18 O.O. 3d at 357, 413 N.E. 2d at 1191. See, also, *Washington Post Co. v. Keogh* (C.A.D.C. 1966), 365 F. 2d 965, 968.

In order to withstand a defendant's motion for summary judgment in a libel action, a public official-plaintiff must produce evidence sufficient to raise a genuine issue of material fact from which a reasonable jury could find actual malice with convincing clarity. *Bukky v. Painesville Tel. & Lake Geauga Printing Co.* (1981), 68 Ohio St. 2d 45, 22 O.O. 3d 183, 428 N.E. 2d 405. Moreover, only factual disputes that might affect the outcome of the suit under the governing law will preclude the entry of a summary judgment. *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. _____, 91 L. Ed. 2d 202.

III

We now look at the evidence, resolving issues of credibility in favor of the plaintiff and giving plaintiff the benefit of inference. We find that WEWS and Younkin portrayed Perez as an official who invited Ferren to run drugs and to wheel and deal in drugs on the streets.

The five material issues identified by the court of appeals and much of the argument submitted on behalf of Perez are directed towards establishment of the above conclusion. For example, the arguments made by Perez about editing, rehearsal of Ferren's story, and request by Younkin to make the statements stronger, all go to prove that WEWS portrayed Perez as soliciting a drug runner. We accept, for the purpose of summary

judgment, that WEWS and Younkin reported such a charge. Thus, the above arguments and the so-called disputes as to "material facts" become minimally relevant. The attitude of the publisher toward the subject, be it hate or ill will, is relevant to the inquiry into malice but it is not the pivotal issue. The inquiry into actual malice in a public-official defamation case should focus on the publisher's attitude toward the truth rather than upon the publisher's attitude toward the plaintiff.

Here, a charge was made by Ferren which can reasonably be interpreted as a charge of illegal activity by a public official and the county department for which he worked. The airing of such charges is precisely the type of publication which the First Amendment does and must protect.

We acknowledge that report of a charge against a public official may work an unfairness to that person. Indeed, the broadcast may have worked an unfairness in the present case. But we agree with the United States District Court for the Southern District of New York when it stated:

"The fairness of the broadcast is not at issue in the libel suit. Publishers and reporters do not commit a libel in a public figure case by publishing unfair one-sided attacks. The issue in the libel suit is whether the publisher recklessly or knowingly published false material." *Westmoreland v. CBS, Inc.* (S.D.N.Y. 1984), 601 F. Supp. 66, 68.

Unfairness is inevitable whenever the facts which form the basis of a charge, made against an official, are subject to two or more interpretations. Here, two interpretations may reasonably be made of the Ferren information. The court of appeals recognized such when

it identified its first disputed issue of fact. The dispute supports (rather than precludes) the issuance of a summary judgment.

Fairness in journalism is a laudable goal but it is not a condition precedent to First Amendment protection. In fact, unfairness is the daily grist of politics. A public official acts, makes statements, and leads a personal life. Value judgments and interpretation attach to a public official's behavior. If the suggestion of criminality is a reasonable inference from something a public official has said or done, the media may draw that inference. Such is the First Amendment's contribution to free, open and honest government.

The essential facts are that Ferren, an admitted drug dealer in Stark County, had not been convicted on any of his drug law violations. He was, on two occasions, asked by Perez about the possibility of being an informant and undercover agent for the Stark County Sheriff's office.[1] Later and while Ferren was in jail for committing a theft on New Year's eve, he was taken from his cell to the office of Perez. According to Ferren, Perez asked Ferren to sell drugs, this time not as an undercover agent or as a "cop." Perez offered to set Ferren up so that Ferren could wheel and deal on the streets. Ferren was told he would be working for Perez and was asked to do runs between Ohio and Michigan.

Perez, in his affidavit, does not deny that the meeting with Ferren took place. Nor does he deny Ferren's report of what was said. Rather, he claims that the conversation was taken out of context.

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[1] Younkin does not acknowledge that he was told about any prior meetings where Ferren was asked to act as an undercover agent. However, for the purpose of summary judgment, we accept as true that such meetings occurred and that Younkin was informed of them.

It is possible that Ferren misunderstood Perez. It is possible that, in the context of the earlier meetings between the two, Ferren was being solicited as an undercover agent in the third meeting as well. It is also possible that the final meeting represented a shift by Perez: that Perez was no longer asking Ferren to work in an undercover role.

Before putting Ferren's version of the encounter on the air, the appellants repeatedly attempted to reach Perez at home and at the sheriff's office to obtain his explanation. The appellants confirmed that Ferren had been in jail when he said he was and that a meeting between Perez and Ferren took place. Ferren's employment was verified. Other law enforcement personnel were interviewed, none controverting Ferren's statements.

Finally, Ferren stated, in the deposition submitted by Perez to oppose the summary judgment, that he told Younkin the truth to the best of his understanding at the time.

In any broadcast, there will be a selection made as to what is newsworthy. The relevant question is whether that selection is made with a view toward dissemination of false information. See *Pierce v. Capital Cities Communications* (E.D. Pa. 1977), 427 F. Supp. 180, 185-186, affirmed (C.A. 3, 1978), 576 F. 2d 495, certiorari denied (1978), 439 U.S. 861. See, also, *Dougherty v. Capitol Cities Communications, Inc.* (E.D. Mich. 1986), 631 F. Supp. 1566; *Brasslett v. Cota* (C.A. 1, 1985), 761 F. 2d 827. In the present case, the omission of material does not demonstrate a disregard for the truth. Rather, it demonstrates that appellants elected to make one of two reasonable interpretations of Ferren's story.

Similarly, the truth or falsity of the story was not altered by the request that Ferren make his statements stronger and clearer. *Tavoulareas v. Piro* (C.A.D.C. 1987), 817 F.2d 762, certiorari denied (1987), 484 U.S. _____, 98 L. Ed. 2d 151.

Where sensationalism is sought at the expense of the truth, actual malice could be inferred. But actual malice is not inherent in a journalistic effort to produce hard-hitting reports which serve the public interest. The distinction between sensationalism and investigative journalism lies in the attitude of the publisher toward the truth. Here, it cannot reasonably be said that the appellants sought sensationalism at the expense of the truth.

The offer to pay Ferren's legal fees, if relevant at all, demonstrates a belief in the truth of the broadcast and of the right to air it.

The fact that the questions put to Ferren and his answers were rehearsed is essentially neutral. See *Silvester v. American Broadcasting Cos.* (S.D. Fla. 1986), 650 F. Supp. 766. Rehearsal does not tend to establish either (1) a high degree of awareness of the falsity of the broadcast or (2) that appellants entertained serious doubts as to the truth of the broadcast.

Finally, appellee draws attention to the role played by those affiliated with the campaign to unseat the Stark County Sheriff. It may be taken as true that such politically interested persons arranged the interview with Ferren, were present at the taping of the broadcast, and hoped that the broadcast would impact favorably on the campaign of their candidate. But this, also, bears little relationship to the truth of the broadcast or to the attitude of the appellants toward the truth. See *Woods v. Evansville Press Co.* (C.A. 7, 1986), 791 F. 2d 480, 488.

What stands out in this case is: that Ferren reported an encounter with Perez which could be interpreted as appellants did in making their broadcast; that Perez has not denied the report of the encounter as described by Ferren on the telecast; that Perez did not avail himself of the opportunity to tell his side of the story; and that appellants conducted an investigation which produced no indication that Ferren's description of what happened was unreliable.

In a public-official defamation case, summary judgment is properly granted for the defendant where no genuine issue of fact exists on the question of whether the publication was made with a high degree of awareness of its falsity. The evidence, taken most favorably to appellee, fails to meet this test. *Garrison, supra.* Nor is there a basis to find that appellants entertained serious doubts as to the truth of the broadcast. *St. Amant, supra.* In short, clear and convincing evidence does not exist to support the contention that appellants knowingly and recklessly broadcast an untruth which defamed the appellee.

Since we find no evidence from which a reasonable jury could find actual malice with convincing clarity, we reverse the judgment of the court of appeals and reinstate the summary judgment granted by the trial court.

Judgment reversed.

MOYER, *C.J.*, LOCHER, DOUGLAS and WRIGHT, *JJ.*, concur.

SWEENEY and HOLMES, *JJ.*, dissent.

HOLMES, *J.*, dissenting. Because I view this case as containing justiciable issues under *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, and its progeny, I must dissent.

It is well-settled that defamation actions will not lie for the occasional and inevitable erroneous statement. *New York Times Co., supra,* at 271-272; *Garrison v. Louisiana* (1964), 379 U.S. 64, 74; *Time, Inc. v. Hill* (1967), 385 U.S. 374, 388. On the other hand, the author of *New York Times* also determined that:

"The use of *calculated falsehood,* however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those *unscrupulous enough* and *skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration.* * * * That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. * * *" (Emphasis added.) *Garrison, supra,* at 75.

By its decision today, the majority has upheld the grant of summary judgment where the plaintiff's depositions, affidavits, and pleadings demonstrated the existence of the factual issue of whether he may reasonably have been the victim of a maliciously published calculated falsehood, which was so published

by a reporter in league with a political candidate, and who sought to directly affect the outcome of a political contest. Where triable issues of this magnitude are before this or any other court, it is imperative that such occurrences be exposed to the full light of trial. Contrary to the majority view, the United States Supreme Court has stated that summary judgment is generally not utilized to decide a defamation case where the publisher's state of mind is called into question under the "actual malice" standard. See, *e.g., Hutchinson v. Proxmire* (1979), 443 U.S. 111, 120, at fn. 9; *Wolston v. Reader's Digest Assn., Inc.* (1979), 443 U.S. 157, 161, at fn. 3.

In the case *sub judice,* the relevant focus must be upon the conduct and state of mind of the publisher, *Curtis Pub. Co. v. Butts* (1967), 388 U.S. 130, 153, whether there was an intent to inflict harm through falsehood, *Garrison, supra,* at 73, and whether the publisher knew or had "reason to suspect that his publication * * * [was] false," *Herbert v. Lando* (1979), 441 U.S. 153, 160. Where the reporter "must have known that a number of the statements in the feature story were untrue," then a finding of calculated falsehood is justified. *Cantrell v. Forest City Pub. Co.* (1974), 419 U.S. 245, 253.

Under the above standard, construing the allegations and supporting materials of the parties in favor of plaintiff, as Civ. R. 56 requires, it can only be concluded that a motion for summary judgment ought not to have been granted to the defendant. In Captain Perez's amended complaint, he avers that the publisher reported that he had seized illegal drugs which were "then subsequently resold in the streets by the plaintiff * * *." In paragraph eleven, he states that such report was untrue, and in paragraph fourteen he states that "all of

which statements and implications were false and untrue * * *." These allegations were reiterated in his answers to defendant's first set of interrogatories at paragraphs four and five, as well as within his deposition at pages 113, 114, 118 and 128. We have, then, allegations of a publication and that such publication was false.

Moreover, on the issue of actual malice, Captain Perez averred in his complaint that the false statements were "known to be untrue or with proper inquiry would have been found to be false and were deliberately made by defendant Younkin * * *." The above allegations which were reiterated in his deposition were opposed by the publisher in his affidavit which asserted little more than his denial of wrongdoing and, as relied upon by the trial court, that he believed in the witness' credibility and had fairly and accurately reported the criminal charges against Captain Perez. The law is, however, clear upon the point that the deposition of a publisher that he acted in good faith will not "automatically" overcome contrary statements in a summary judgment proceeding. See *St. Amant v. Thompson* (1968), 390 U.S. 727, 732.

More particularly, Captain Perez relied upon two specific allegations which, if either were proven at trial, could satisfy the "actual malice" standard under applicable law. First, it was asserted that the publisher relied upon one known to be a drug dealer, who was known to have a criminal record and was of bad repute, and that the publisher failed to investigate the informant's allegations. The law in this area is beyond dispute. Whenever the publisher asserts reliance upon the word of an informant, the inquiry may shift to the reputation of the informer for veracity. *St. Amant, supra,* at 733. Furthermore, "*recklessness* may be found where there are obvious reasons to doubt the veracity of the

informant *or* the accuracy of his reports." (Emphasis added.) *Id.* at 732. This may also imply a subjective awareness of probable falsity, *i.e.*, that the publisher, " 'in fact entertained serious doubts as to the truth of his publication.' " *Herbert v. Lando, supra*, at 156-157, quoting *St. Amant, supra*, at 731.

Applying such standards to the present case we find, as undisputed fact, an informant with a criminal past who was a known drug dealer, and whose services as a drug informant had been refused by Captain Perez some time prior to the interview. That the publisher knew of his informant's criminal past cannot be doubted since he made such past a part of his presentation, and also because he had procured the story in cooperation with the candidate who was ultimately elected. The publisher's statement that he sought police comment is, first of all, only of tangential use on the issue of whether the publisher failed to investigate the accuracy of the report. There may have been fair reason to refuse comment to the publisher. For example, a story by Younkin revealed the secret location of the narcotic squad's operational base, the various methods used to investigate drug dealers, as well as the identities of participating enforcement agents. Further, in Captain Perez's deposition, he stated that he refused to talk to the publisher because, on a prior occasion when discussion was had over a particular matter, the publisher "went back to the TV and told them just the opposite." Also, he stated under oath that he had no knowledge as to the subject of the publisher's phone calls. By reliance upon unanswered phone calls, the publisher can hardly be said to have discharged his duty to investigate the accuracy of an obviously suspect story initiated by a source having every motive to destroy the effectiveness of the narcotics unit.

The second allegation was that the publisher had adjusted the informant's version of the events. This allegation is contained in Captain Perez's affidavit and made in express reliance upon revelations of such conduct set forth in the deposition of the informant. Evidence of the editorial process, *i.e.*, the decision-making process, to include or exclude particular material or to publish one version of a story instead of another, is particularly relevant in determining the existence of actual malice. *Herbert v. Lando, supra*, at 157, 173. An "examination of the editorial process [is appropriate] to prove the necessary awareness of probable falsehood * * *." *Id.* at 172. In the instant case, the informant's deposition stated that during rehearsals for the on-camera interview, the publisher solicited changes in wording, both to eliminate and to substitute words, for the stated purpose of making such statements "stronger." This statement clearly provides evidence upon the issue of actual malice. Therefore, these matters should be remanded for trial as presenting triable issues.

Accordingly, I dissent.

SWEENEY, *J.*, concurs in the foregoing dissenting opinion.

OPINION OF THE COURT OF APPEALS, STARK COUNTY, OHIO

(Filed November 10, 1986)

Case No. CA-6874

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ROBERT PEREZ,
Plaintiff-Appellant,

vs.

WEWS, *et al.*,
Defendants-Appellees.

OPINION

PUTMAN, *P.J.*

In *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 279-280, the U.S. Supreme Court held that in a libel suit brought by a public official, the First Amendment requires the plaintiff to show that in publishing the defamatory statement, the defendant acted with actual malice—"with knowledge that it was false or with reckless disregard of whether it was false or not." It was further held that such malice must be shown with "convincing clarity." *Id.* at 285-286. See also *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, 342. These *New York Times* requirements have since been extended to libel suits brought by public figures as well. See e.g., *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130.

In 1986, the rule was laid down that the clear and convincing requirement must be considered by a trial court ruling upon a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure in a case to which *New York Times* applies. See *Jack Anderson, et al., Petitioners v. Liberty Lobby, Inc., and Willis A. Carto* (1986), _____ U.S. _____, 106 S.Ct. 2505, 91 L.Ed.2d 202, No. 84-1602, decided June 25, 1986, 46 CCH S. Ct. Bull. P. The Ohio Civil Rule is the same in number and substantial text as the Federal Rule.

In this case, we reverse and remand for trial because the evidence is such that reasonable jurors could find that the defendants not only knew the publication was false, but actually created the falsehood intentionally.

Rule 56(e) provides that when a properly supported motion for summary judgment is made, the adverse party "must set forth specific facts showing that there is a genuine issue for trial."

There is no requirement that the trial judge must make findings of fact. The threshold inquiry is that of determining whether there is the need for a jury trial—whether, in other words, there are any genuine factual issues that can reasonably be resolved only by a finder of fact.

We conclude that there was sufficient evidence of high enough quality so as to mandate the submission of it to a jury for resolution.

We consider it to be clear that the plaintiff was a public official so as to bring the defendants within the scope of the *New York Times* rule.

We first set forth a history of the litigation, also known as a statement of the case.

On October 31, 1980, the plaintiff-appellant, Robert Perez, filed a complaint in the Court of Common Pleas of Stark County, Ohio, against the defendants-appellees, Scripps-Howard Broadcasting (television station WEWS) and Bill Younkin, alleging libel and defamation of character arising out of a series of television broadcast "investigative reports" which represented that the plaintiff-appellant, then an officer in the Stark County Sheriff's Department, seized illegal narcotics and then re-sold them on the street.

On March 6, 1981, with leave of court, the plaintiff-appellant filed an amended complaint which joined an additional party-defendant, Edward Ferren.

To the amended complaint, all of the defendants filed their respective answers denying the allegations contained in the amended complaint.

Extensive discovery was performed by all parties to the action, and, over a period of several years, the case was repeatedly assigned for trial and continued. Affidavits of prejudice were filed by the defendants-appellees, Scripps-Howard Broadcasting and Bill Younkin, and dismissed by the Ohio Supreme Court, and eventually, on July 30, 1984, three years and nine months after the filing of the complaint, the defendants-appellants, Scripps-Howard Broadcasting and Bill Younkin, without leave of court, filed a motion for summary judgment.

In support of their motion for summary judgment, the defendants-appellees offered the affidavit of William Younkin, and relied upon the answers to interrogatories of the plaintiff-appellant, Robert Perez.

Previously filed in the record was the deposition of Robert Perez. The plaintiff-appellant filed a brief in opposition to the motion for summary judgment of the defendants-appellees, and in support thereof, offered the affidavit of Robert Perez, which incorporated the deposition of Edward Ferren.

On January 31, 1986, the Hon. Joseph P. Malone, sitting upon the case by assignment, sustained the motion of the defendants-appellees for summary judgment.

In his judgment entry, Judge Malone held as a matter of law that the plaintiff was a "public official."

The court then considered the issue of "actual malice," and stated, "the court finds that a jury acting reasonably could not find actual malice with convincing clarity."

Based upon the foregoing, the court granted the motion for summary judgment. Additionally, in the judgment entry, the court noted, "no just cause for delay." (See Civ.R.56(B)). This made the judgment appealable.

On February 26, 1986, the plaintiff-appellant, Robert Perez, filed his notice of appeal to the Court of Appeals for Stark County, Ohio, from the judgment entry of January 31, 1986.

Perez assigned two errors:

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DETERMINED AS A MATTER OF LAW THAT THE PLAINTIFF-APPELLANT, ROBERT PEREZ, A DEPUTY IN THE STARK COUNTY SHERIFF'S DEPARTMENT WAS A "PUBLIC OFFICIAL."

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT GRANTED SUMMARY JUDGMENT TO THE DEFENDANTS-APPELLEES, SCRIPPS-HOWARD BROADCASTING AND BILL YOUNKIN, WHERE THE PLEADINGS, DEPOSITIONS, AFFIDAVITS, AND OTHER DOCUMENTARY MATERIAL FILED IN THE RECORD ESTABLISH GENUINE ISSUES OF MATERIAL FACT WHICH ARE IN DISPUTE AND WHERE THE DEFENDANTS-APPELLEES WERE NOT ENTITLED TO A JUDGMENT AS A MATTER OF LAW.

A recital of the facts will illuminate the assignments of error.

In October of 1980, Robert Perez and Sam Sainer were Stark County Deputy Sheriffs and Robert Berens was an auxiliary Deputy Sheriff. Their boss, Sheriff George Papadopulous, a Democrat, was a candidate for re-election in the up-coming November general election. But Berens was running as a Republican against his boss, Papadopulous, and Sainer was actively campaigning for Berens.

In 1980, the plaintiff-appellant, Robert Perez, hereinafter referred to as Perez, was employed by the Stark County Sheriff's Department as a "Captain."

Perez had joined the Stark County Sheriff's Department in 1954 as a "road man." In 1959, Perez became a Detective. During the tenure of Sheriff Papadopulous, Perez was made a Captain in the Stark County Sheriff's Department. Perez remained a Captain until he resigned from the Stark County Sheriff's Department following the defeat of Sheriff Papadopulous by Robert Berens.

As a Captain in the Stark County Sheriff's Department, Perez's duties included investigation of criminal offenses, administration of the detective bureau, along with helping out with the patrol division. While he was a Captain, he was responsible to report directly to the Sheriff.

Perez participated in the development of the Stark County Metropolitan Narcotics Unit, and worked under Don Jones, its first administrator.

The defendant-appellee, William Younkin, was in 1980 employed by Scripps-Howard Broadcasting Company as a reporter for television station WEWS, Channel 5, Cleveland, Ohio.

In August of 1980, Younkin investigated and prepared a series of "investigative reports" on activities in and about the Stark County Sheriff's Department.

On September 25, 1980, television station WEWS, Channel 5, Cleveland, Ohio, broadcast on the 11:00 News an "investigative report" by William Younkin.

As a lead-in to the investigative report of William Younkin, the following statement was made by Mr. Maynor of WEWS:

> Mr. Maynor: For the past several days Bill Younkin has been putting together another puzzle, this one linking men behind the badges and their own illegal drug business. Tonight he's here for the startling finale of this series.

In his investigative report, Mr. Younkin interviewed one Edward Ferren. The following broadcast of a portion of that interview was made:

> Ed Ferren used to deal heavily in drugs. But like many others I've talked with, he was never convicted of any drug law violations in Stark County.

A couple of years ago he was in the Stark County Jail following a New Year's prank. During his stay in jail he tells me Captain Robert Perez had him taken out of his cell and into Perez' office.

Mr. Ferren: He proposed that I, you know, sell drugs.

Mr. Younkin: As an undercover agent?

Mr. Ferren: Never mentioned being undercover. He never mentioned nothing about being a cop. He just wanted me to do drugs. He just said "I want you to do the runs between here and Michigan."

Mr. Younkin: For him?

Mr. Ferren: That's what he was asking. He didn't ask me to do it for myself. I was already in custody.

Mr. Younkin: He actually said the runs, make the runs?

Mr. Ferren: He knew the same runs I did. He mentioned the same people I knew between Canton, Ohio and Michigan. He knew the same runs, he knows the same people. Only he might not know the exact people but he knows the same connections.

Mr. Younkin: And he actually said to you, "I want you to make the runs"?

Mr. Ferren: Yeah. He told me, he said—he didn't talk about nothing about being a cop. He just talking about doing drugs out on the streets.

Mr. Younkin: And wheeling and dealing?

Mr. Ferren: Yeah. He told me, he says "Set you up and you can wheel and deal," he says, "but you'll be working for me."

On October 17, 1980, on the 6:00 P.M. News, television station WEWS, Channel 5, Cleveland, Ohio, broadcast another investigative report by William Younkin.

During that broadcast, Mr. Younkin made the following statements:

> Mr. Younkin: In a prepared news release, Stark County Sheriff George Papadopulous has announced that his special Board of Inquiry, made up of his own deputies can find no basis for the allegations raised in our probe of his Department.
>
> Mr. Ferren, an admitted former drug dealer, said one of Sheriff Papadopulous' top officers was involved in his own drug deals.
>
> Ferren told me he was in the Stark County Jail when Captain Robert Perez offered him a deal to make the drug runs for him, Captain Perez.
>
> According to the Sheriff's news release, the five-member panel could find no one who could name Perez, even though they did talk with Ed Ferren. I talked with Ferren by phone this afternoon. He told me he never changed his story at all.
>
> Mr. Ferren: I'll just tell you, man, I stand by what I said.
>
> Mr. Younkin: The Sheriff questioned my source's credibility and he says he considers the case closed. I'm Bill Younkin, TV-5 Eyewitness News.

In a lengthy affidavit filed in support of the motion for summary judgment, William Younkin stated that in September, 1980, he was contacted by Deputy Sam Sainer of the Stark County Sheriff's Department who told him that he knew some people who might be able to confirm a link between the Sheriff's Department and illegal drug sales. Younkin stated that because Deputy Sainer had in the past been "a reliable source of leads and information for me," Younkin decided to investigate further and arranged to meet him with Jim Nash, Ed Ferren, Mike Norris, Bill Nut, Danny Van Allman, and Jackie Chisolm, which was attended by Sam Sainer.

In his affidavit, William Younkin stated as follows:

16. At the meeting described in paragraph 14, Edward Ferren informed me of a specific incident involving him and Captain Perez when he was in jail following a New Year's prank involving the theft of a phone booth. He told me that Captain Perez had had him taken out of his cell for a conversation in Perez's office in which Perez asked him to work for Perez personally in the illegal drug business, to "do the runs" between Ann Arbor, Michigan and Stark County. Ferren specifically stated that he was not asked to do this in an undercover capacity. He said no one else was present during this conversation between himself and Perez.

17. Ferren admitted to me that he was a former drug dealer, but said that he had never been convicted of any drug-related crimes. He indicated that he had stopped dealing in drugs, that he had a good job with the Hoover Company and (sic) that he wanted to retain, and that he was trying to straighten out his life.

. . .

19. Based upon his demeanor and apparent sincerity, his articulated motivation, his ability to corroborate through photos and the statements of others (sic) various circumstantial details of his statements, his ability to give me a detailed account of his private interview with Captain Perez, and his willingness to be interviewed on camera despite his fear of repercussions, I believed Ferren.

. . .

39. I have never held any personal malice or ill will towards Robert Perez and I have never had any desire or intention to do him personal harm. I have no personal interest in the affairs of Robert Perez. My intention in broadcasting these reports was to expose to the public view serious and, in my

estimation, credible charges concerning improprieties and possible illegal activity in the Stark County Sheriff's Department.

40. I believed that the reports that I broadcast faithfully, fairly and accurately reported the facts contained therein and the charges being made about Captain Perez and, to the extent I had access to them, his response to those charges. At no time did I doubt that the reports that I made were substantially true. In my career as a journalist, I have always attempted to be factual and accurate in every respect, and I have never broadcast a statement that I did not believe to be true.

The plaintiff-appellant, Robert Perez, in his affidavit filed in opposition to the motion for summary judgment stated:

3. That he was one of the first members of the "Metro Squad", a special unit composed of sheriff deputies, city police and representatives of law enforcement in Stark County, Ohio to eliminate drug trafficking in the Stark County area.

4. That as part of his duties he, by securing information especially from persons who were involved in drug trafficking or had been convicted of drug abuse or drug sale, became acquainted with sources of supply from persons who knew of the source of supply and persons who were dealing in the drug trade and the location of said sources.

5. Affiant says that he was informed by another officer that one Ed Ferren might have information that would assist law enforcement officers to infiltrate and learn of drug dealers and suppliers who sold and supplied drugs to persons in this area.

6. That while Ed Ferren was in jail he interviewed him with the knowledge of his mother and step-father to determine if he could assist the metro group by acting as an informant to affiant or other persons in law enforcement.

7. That said interview involved discussions of sources of drugs including locations in Columbus and Michigan.

8. That affiant did not determine that Ferren would be helpful as an informant and the discussions were not followed by further action.

9. That thereafter the defendant Younkin broadcast an interview of said Ed Ferren implying that the interview was spontaneous, unrehearsed and without prompting.

10. That attached hereto is the deposition of said Ed Ferren which reveals the method of the interview.

11. That a casual examination of this deposition shown it was not only done with reckless disregard but with actual malice.

12. Affiant further states that other acts of the defendant Younkin, in addition to this report, were equally vicious, intentional (sic) and demeaning to this affiant.

The affidavit of Robert Perez incorporated the deposition of Ed Ferren taken as on cross-examination by the plaintiff-appellant.

In his deposition, Edward Ferren testified that he talked to Perez three times and that the first two times Perez asked him (Ferren) to work as an undercover agent (See Ferren depos. p. 46). Ferren further testified that during the meeting with Mr. Younkin, he told Younkin that the discussion that he had had with Perez involved Perez attempting to solicit him for work as an undercover agent, but Younkin left that out of his broadcasts. We consider the evidence of that fact to be crucial. Further, Ferren testified that during the meeting with Younkin, he observed Sheriff Robert Berens in a vehicle outside the house where Younkin was interviewing him.

Ferren also testified that Younkin asked him to make his statements differently (Ferren depos., p. 20, l. 4); that Younkin offered to pay his legal fees in the event that there were any legal problems from the broadcast (Ferren depos., p. 22); and that Younkin cut-out portions of the interview which were not aired on the broadcast, rehearsed him two or three times before taping and, asked him to make his statements stronger (Ferren depos., pp. 27, 29).

In other broadcasts during the same series, Mr. Younkin stated that Perez had accepted a pay-off.

We have previously stated that the basis of the first assignment of error is not well taken because Perez was, in our judgment, a public official. See *Milkovich v. News-Herald* (1984), 15 Ohio St. 3d 292, 297.

We move now to the second assignment of error and determine that the trial court should not have entered a summary judgment, but rather, held the case for trial. Rule 56(C) of the Ohio Rules of Civil Procedure states in pertinent part as follows:

> Summary judgment shall be rendered forthwith in the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the

motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor.

The Ohio Supreme Court in the case of *Williams v. Church,* 37 Ohio St. 2d 150 (1974), held that on summary judgment, the inferences to be drawn from the underlying facts contained in such material as depositions, affidavits, and exhibits must be viewed in the light most favorable to the party opposing the motion, and if, when so viewed, reasonable minds can come to differing conclusions, the motion should be overruled.

In Ohio, it is well settled that it is outside the province of a summary judgment hearing to resolve issues of credibility. *Duke v. Sanymetal Products Co., Inc.* (1972), 31 Ohio App. 2d 78.

In the judgment entry granting summary judgment to the defendants-appellees, the trial court concluded that there was no evidence that may be construed to show that the alleged false statements were made with a "high degree of awareness of their probable falsity." *Garrison v. Louisiana* (1964), 379 U.S. 64.

The court further stated in the judgment entry that "a jury acting reasonable could not find actual malice with convincing clarity."

However, given the conflicts between the testimony of Edward Ferren contained in the deposition of Edward Ferren as to the rehearsals of his interview by Mr. Younkin, the requests of Mr. Younkin to make his testimony stronger, and the omission from the telecasts of the testimony of Edward Ferren that he had told Mr. Younkin that the alleged recruitment was that as an undercover (enforcement) agent (Ferren depos., pp. 20,

27, 29), it is clear that there are genuine issues of material fact as to the existence of actual malice on the part of the defendants-appellees, Scripps-Howard Broadcasting and Bill Younkin.

Reasonable jurors could conclude that actual malice appears with convincing clarity. Specifically, it is material and genuinely disputed:

> 1. Whether the entire Ferren interview showed no more than that Perez was recruiting Ferren to work as an "undercover cop" and whether Younkin intentionally omitted that part of the interview so as to make corruption falsely appear;
>
> 2. Whether Younkin intentionally manufactured falsehood out of innocence, motivated by a malicious purpose to destroy Sheriff Papadopulous so as to elect Robert Berens.

Younkin's failure to disclose in his broadcast that Sainer was present at the Ferren-Younkin interview he broadcast and that Berens was outside at that time (Ferren depos., p. 30); the failure to disclose Sainer's urging Ferren at that interview to post "Elect Berens Sheriff" campaign signs (Ferren depos., p. 30, ll. 1-15); Younkin's repeated rehearsals of Ferren coupled with repeated urgings to "make it stronger" (Ferren depos., p. 20, l. 5; p. 27, l. 10; p. 20, l. 23), all might be considered to be corroborative of a malicious motivation behind the act of intentionally creating falsehood by omitting from the telecast the fact that Perez' first contacts with Ferren were to recruit him as an undercover law enforcement agent.

Thus, reasonable jurors could not only conclude more than a "high degree of awareness of the falsehood," but actually the intentional creation of it.

In 1918, Justice Oliver Wendell Holmes wrote:

> A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and context according to the circumstances and the time in which it was used.

Towne v. Eisner (1918), 245 U.S. 418, 425.

Stripped of the context of the two preceding conversations and emptied of the vital occasions that gave them birth and meaning, the rehearsal and strengthened re-creation of the isolated third conversation appears, with convincing clarity, to have been maliciously planned to cast large upon the television screen a shadow of the appearance of guilt caused solely by hiding from view the actual figure of innocence, and reasonable jurors could so conclude.

Credibility of the witnesses is never at issue on summary judgment. The judicial task is not to decide what the actual truth is, but merely whether reasonable jurors, exercising their exclusive power to judge credibility, reasonably could find the evidence showed malice with convincing clarity.

We find the evidence to be such as to preclude a summary judgment for the defendants.

Pertinent portions of the deposition of Ferren are photocopied and attached hereto.

For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County is reversed and this cause is remanded to that court for further proceedings according to law.

MILLIGAN, *J.* and
WISE, *J.* concur.

/s/ NORMAN J. PUTNAM
/s/ JOHN R. MILLIGAN
/s/ EARLE E. WISE

JUDGMENT ENTRY OF THE COURT OF APPEALS OF STARK COUNTY, OHIO

(Filed November 10, 1986)

Case No. CA-6874

IN THE COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ROBERT PEREZ,
Plaintiff-Appellant,

vs.

WEWS, *et al.*,
Defendants-Appellees.

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Stark County, Ohio, is reversed and this cause is remanded to that court for further proceedings according to law.

Pursuant to the doctrine of *North v. Pennsylvania Railroad Co.* (1969), 9 Ohio St.2d 169, we certify that a genuine dispute exists as to the following material facts:

1. Did the entirety of the Perez-Ferren conversations as told to Younkin by Ferren show nothing more than Perez attempting to recruit Ferren to work "undercover" as a law enforcement agent?

2. Did Younkin believe that if he told the whole story, there would be "no news"?

3. Did Younkin, in his broadcast, take away the context and surrounding circumstances from the third Perez-Ferren interview intending thereby to alter the meaning of the spoken words from innocence to guilt?

4. Did Younkin conceal the Sainer-Berens part of the story because he believed it would show a motive to falsify, thus impairing the credibility of his report?

5. Did Younkin intend unjustifiably to injure the reputation of Perez so as to destroy Sheriff Papadopulous and elect Robert Berens Sheriff?

/s/ NORMAN J. PUTNAM
/s/ JOHN R. MILLIGAN
/s/ EARLE E. WISE
Judges

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS, STARK COUNTY, OHIO

(Filed January 31, 1986)

Case No. 80-1514-0

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

ROBERT PEREZ,
Plaintiff,

vs

WEWS, *et al.*,
Defendants.

JUDGMENT ENTRY

This matter comes before the Court on Motion of Defendants Scripps-Howard Broadcasting Company and William Younkin for Summary Judgment, filed herein on July 30th, 1984. In considering said Motion, the Court has carefully reviewed the numerous pleadings and documentary evidence submitted herein.

Plaintiff, a former captain of the Stark County Sheriff's Department, has sued the above-named Defendants for defamation. Defendants claim in their Motion for Summary Judgment that the Plaintiff is a public official and that they are thus entitled to Summary Judgment in that Plaintiff has failed to demonstrate actual malice as is required pursuant to *New York Times Co. v. Sullivan* (1964), 376 U.S. 254.

The first question before this Court is whether the Plaintiff is a public official. The Court notes that in *Rosenblatt v. Baer* (1966) 383 U.S. 75, the United States

Supreme Court stated that the inquiry into whether one is a public official is a question for the trial judge to determine. *See also, Milkovich v. News-Herald* (1984) 15 Ohio St. 3d 292.

The United States Supreme Court in *Rosenblatt, supra*, stated:

> "It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs."

The Court hereby finds Plaintiff to be a public official as a matter of law and within the meaning of the First Amendment. While this Court has been unable to find an Ohio published decision where a similar law enforcement plaintiff was declared to be a public official, nevertheless, this Court believes its finding to be correct under the facts presented herein, and in accord with the recent interpretation of the Ohio Supreme Court regarding the term "public official" found in *Milkovich vs. News-Herald* (1984) 15 Ohio St. 3d 292.

Plaintiff's deposition sufficiently demonstrates that Plaintiff was a governmental employee who had or appeared to the public to have substantial responsibility for or control over the conduct of governmental affairs (*See* Plaintiff's deposition at p. 14, pp. 83-86, p. 91). The Court further agrees with the opinions in *Coursey vs. Greater Township Publishing Co.* (1968) 40 Ill. 2d 257, 239 N.E. 2d 837, and *Moriarty vs. Lippe* (1972) 162 Conn. 371, 294 A. 2d 326, which state that law enforcement officers perform a primary function in local government and that the public's interest in the qualifications and conduct of such officers is so great

that public discussion and public criticism towards such officers cannot constitutionally be inhibited by the threat of prosecution under State libel laws.

This Court therefore concludes that Plaintiff, for purposes of this action, is a public official. The Court must now consider whether there is a genuine issue of material fact regarding the element of actual malice.

Actual malice means that the alleged defamatory statements were published with knowledge of their falsity or with a reckless disregard of whether or not the facts upon which the publication was based were true or false. 35 O. Jur. 3d *Defamation and Privacy* section 41. The focus of inquiry is on Defendants' attitude toward the truth or falsity of the publication, and a public official may recover only upon clear and convincing proof of actual malice. *Dupler v. Mansfield Journal* (1980) 64 Ohio St. 2d 116.

In considering Defendants' Motion for Summary Judgment, this Court is limited to examining the evidence "taking all permissible inferences and resolving questions of credibility in Plaintiff's favor to determine whether a reasonable jury acting reasonably could find actual malice with convincing clarity." *Dupler, supra.*

Applying the above standard to the evidence herein, the Court finds that a jury acting reasonably could not find actual malice with convincing clarity. Therefore, this Court finds that the Defendants are entitled to Summary Judgment in their favor.

The Court has carefully examined all of the pleadings and evidence, construing it most strongly in favor of the Plaintiff. Upon careful consideration, the Court finds no evidence that may be construed to show that the alleged

false statements were made with a "high degree of awareness of their probable falsity." *Garrison v. Louisiana* (1964) 379 U.S. 64.

Wherefore, Summary Judgment is hereby entered in favor of the Defendants, Scripps-Howard Broadcasting Company and William Younkin, and against the Plaintiff, Robert Perez.

No just cause for delay. This action shall proceed as to the remaining Defendant, Edward Ferren.

IT IS SO ORDERED.

/s/ JOSEPH P. MALLONE
By Assignment

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO

(Dated March 9, 1988)

Case No. 87-34

THE SUPREME COURT OF OHIO
COLUMBUS

ROBERT PEREZ,
Appellee,

vs.

SCRIPPS-HOWARD BROADCASTING CO., *et al.*,
Appellants.

JUDGMENT ENTRY

This cause, here on appeal from the Court of Appeals for Stark County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed and the summary judgment granted by the trial court is reinstated consistent with the opinion rendered herein.

It is further ordered that the appellants recover from the appellee their costs herein expended; and that a mandate be sent to the Court of Common Pleas for Stark County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Stark County for entry.

/s/ THOMAS J. MOYER
Chief Justice

MANDATE OF THE SUPREME COURT OF OHIO

(Dated March 9, 1988)

Case No. 87-34

THE SUPREME COURT OF OHIO
COLUMBUS

ROBERT PEREZ,
Appellee,
vs.
SCRIPPS-HOWARD BROADCASTING CO., *et al.*,
Appellants.

MANDATE

To the Honorable Court of Common Pleas

Within and for the County of Stark, Ohio.

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals is reversed and the summary judgment granted by the trial court is reinstated consistent with the opinion rendered herein.

COSTS:

Motion Fee, $20.00, paid by Baker & Hostetler.

/s/ THOMAS J. MOYER
Chief Justice

OHIO RULES OF CIVIL PROCEDURE

Rule 56. Summary judgment

(A) For party seeking affirmative relief. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(B) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(C) Motion and proceedings thereon. The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless

it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(D) Case not fully adjudicated upon motion. If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(E) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for

summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(F) When affidavits unavailable. Should it appear from the affidavits of a party opposing the motion for summary judgment that he cannot for sufficient reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(G) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(Amended, eff 7-1-76)

AMENDED COMPLAINT FILED IN THE COURT OF COMMON PLEAS, STARK COUNTY, OHIO

Case No. 80-1514

JUDGE DEHOFF

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

ROBERT PEREZ,
Plaintiff,

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY (TELEVISION STATION WEWS),

and

BILL YOUNKIN,

and

EDWARD FERREN,
Defendants.

AMENDED COMPLAINT

1. Plaintiff says that he was a Deputy Sheriff of Stark County, Ohio, having served the Sheriff's office as a deputy for 25 years under the direction of three persons who were sheriff of Stark County, Ohio and that he had risen from the position of patrolman to captain in the sheriff's department.

2. Plaintiff further states that he is informed that the defendant Bill Younkin is a reporter for Scripps-Howard Broadcasting Company (Television Station WEWS) in Cleveland, Ohio and as such has interviewed various persons concerning the conduct of the plaintiff in his official capacity as a law enforcement officer of Stark County, Ohio.

3. Plaintiff further states that Scripps-Howard Broadcasting Station (Television Station WEWS) is located in Cleveland, Ohio and known as Channel 5 and has extensive news coverage in the Canton Stark County area, the area of the residence of the plaintiff and his family, and the area of his employment as a captain in the sheriff's organization.

4. Plaintiff further states that as a member of the Sheriff's Department of Stark County, Ohio he had been for many years assigned to the drug enforcement division of the Stark County Sheriff's Department in an effort to suppress and eliminate drug traffic in the Stark County area, that in so doing it had been his duty to enforce the laws of drug abuse, including search, arrest and supplying of information for conviction to the Stark County Prosecutor's office.

5. Plaintiff further states that he in so doing was required to secure evidence consisting of illegal drugs used in trafficking in the Stark County area, said illegal drugs being described as illegal amphetamines, barbiturates, mescaline, heroin, cocaine, hashish and angel dust, or tea, and that during the period of time he was engaged as a law enforcement officer of the Stark County Sheriff and specifically assigned to the drug enforcement unit he arrested numerous persons engaged in illegal drug traffic and has confiscated hundreds of pounds of illegal drugs including those named above and also including large amounts of marijuana.

6. Plaintiff further says that a method of investigation was developed by the sheriff's department in cooperation with other law enforcement agencies, to wit: the Stark County Prosecutor, various law enforcement agencies of cities and villages in Stark County as well as well as Stark Metropolitan Narcotics Unit, to suppress and eliminate the illegal drug traffic in this area.

7. Plaintiff further states that heretofore in a series of television broadcasts by the above named defendant Bill Younkin, as an agent and representative of Scripps-Howard Broadcasting Company (Television Station WEWS) of Cleveland, Ohio, said Bill Younkin supplied and reported as true, allegations that this plaintiff together with other law enforcement officers were engaged in disposition of and sale of illegal narcotics and contraband in Stark County, Ohio.

8. Plaintiff further states that said defendant Bill Younkin presented as evidence of said facts statements of persons who were known drug dealers, who had been under investigation or had been previously arrested and convicted for engaging in illegal drug trafficking, to support said allegations.

9. Plaintiff further states that the defendant Edward Ferren previously had been under investigation for drug offenses in the Stark County area, said investigation being conducted by the plaintiff herein and members of the Stark County Metro unit and that defendant Edward Ferren in an effort to destroy the reputation of the plaintiff and to divert investigation of him and his associates made the allegations which were untrue and in an effort to promote his scheme to destroy the effectiveness of the drug investigation in Stark County reported the same to the said Bill Younkin who

in turn published said false and malicious allegations on said television station without first exercising reasonable care to prevent the publication or utterance of such defamatory statements.

10. Plaintiff further states that defendant Younkin and the television station referred to above reported as true that illegal drugs were seized and then subsequently resold in the streets by the plaintiff and other law enforcement persons and that only a portion of the drugs seized were delivered to the courts for disposition.

11. Plaintiff further states that said statements were untrue or known to be untrue or with proper inquiry would have been found to be false and were deliberately made by the defendant Younkin for the purpose of his own selfish promotion in becoming a so-called "investigative reporter" and for the promotion of his own personal advancement, to create sensational allegations in that respect and that statements, although being made by known drug dealers and persons known to have criminal records and of bad repute, were reported by said Younkin as true facts.

12. Plaintiff further states that defendant Scripps-Howard Broadcasting Company (Television Station WEWS) failed to investigate prior to reporting of said accusations to determine the accuracy and truth of the statements which were made by the said Bill Younkin, its news reporter.

13. Plaintiff further states that by reason of the actions of defendant Younkin, the agent and representative of defendant Scripps-Howard Broadcasting Company (Television Station WEWS) his law enforcement performance was impaired, that plaintiff's position as a law enforcement officer was weakened; that he received numerous threats upon his

life and that of his family; and that the investigative techniques of said law enforcement personnel were exposed and impaired.

14. Plaintiff further states that the actions of the defendants herein have made him the object of ridicule; that by reason of the improper reports and innuendo, the impression was left that the plaintiff was unsuitable to serve properly in his position as a law enforcement officer and that the purpose of said Younkin was to impune plaintiff's character and reputation as a law enforcement officer, and that the same made him the object of hatred, contempt and ridicule in alleging by innuendo that in his official capacity he was guilty of illegal acts, guilty of want of integrity, all of which statements and implications were false and untrue and that if said representation were investigated by the defendants they would have learned and would have known that said allegations were untrue and would become damaging to the character and reputation of the plaintiff as well as damaging his effectiveness in his official capacity a Deputy Sheriff of Stark County, Ohio.

15. Plaintiff further states that the acts of the defendants were malicious and intentional and were inspired by the ulterior motive of defendant Younkin to impune the character and reputation of the plaintiff herein for the purpose of enhancing his own reputation as a sensational reporter and in so doing were intended to injure plaintiff in his capacity as a law enforcement officer.

16. Plaintiff further states that the reporting by defendants herein caused embarrassment and humiliation and distress to the plaintiff and the members of his family, all to the damage of the plaintiff in the sum of Five Hundred Thousand ($500,000) Dollars.

17. Plaintiff further states that the actions of the defendants herein were intentional and willful and that by reason thereof plaintiff is entitled to punitive damages in this cause in the sum of Five Hundred Thousand ($500,000) Dollars.

Wherefore, plaintiff prays judgment against the defendants in the sum of Five Hundred Thousand ($500,000) Dollars and punitive damages in the sum of Five Hundred Thousand ($500,000) Dollars and his costs herein expended.

/s/ HARRY W. SCHMUCK
Attorney for Plaintiff

EXCERPT FROM AFFIDAVIT OF WILLIAM YOUNKIN

* * * * *

16. At the meeting described in paragraph 14, Edward Ferren informed me of a specific incident involving him and Captain Perez when he was in jail following a New Year's prank involving the theft of a phone booth. He told me that Captain Perez had had him taken out of his cell for a conversation in Perez's office in which Perez asked him to work for Perez personally in the illegal drug business, to "do the runs" between Ann Arbor, Michigan and Stark County. Ferren specifically stated that he was not asked to do this in an undercover capacity. He said no one else was present during this conversation between himself and Perez.

17. Ferren admitted to me that he was a former drug dealer, but said that he had never been convicted of any drug-related crimes. He indicated that he had stopped dealing in drugs, that he had a good job with the Hoover Company and that he wanted to retain, and that he was trying to straighten out his life.

* * *

19. Based upon his demeanor and apparent sincerity, his articulated motivation, his ability to corroborate through photos and the statements of others various circumstantial details of his statements, his ability to give me a detailed account of his private interview with Captain Perez, and his willingness to be interviewed on camera despite his fear of repercussions, I believed Ferren.

* * *

39. I have never held any personal malice or ill will towards Robert Perez and I have never had any desire or intention to do him personal harm. I have no personal interest in the affairs of Robert Perez. My intention in broadcasting these reports was to expose to the public view serious and, in my estimation, credible charges concerning improprieties and possible illegal activity in the Stark County Sheriff's Department.

* * *

40. I believed that the reports that I broadcast faithfully, fairly and accurately reported the facts contained therein and the charges being made about Captain Perez and, to the extent I had access to them, his response to those charges. At no time did I doubt that the reports that I made were substantially true. In my career as a journalist, I have always attempted to be factual and accurate in every respect, and I have never broadcast a statement that I did not believe to be true.

EXCERPT FROM AFFIDAVIT OF ROBERT PEREZ

* * * * *

3. That he was one of the first members of the "Metro Squad", a special unit composed of sheriff deputies, city police and representatives of law enforcement in Stark County, Ohio to eliminate drug trafficking in the Stark County area.

4. That as part of his duties he, by securing information especially from persons who were involved in drug trafficking or had been convicted of drug abuse or drug sale, became acquainted with sources of supply from persons who knew of the source of supply and persons who were dealing in the drug trade and the location of said sources.

5. Affiant says that he was informed by another officer that one Ed Ferren might have information that would assist law enforcement officers to infiltrate and learn of drug dealers and suppliers who sold and supplied drugs to persons in this area.

* * * * *

(2)

No. 87-2025

IN THE

Supreme Court of the United States

October Term, 1987

ROBERT PEREZ,
Petitioner,

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENTS' BRIEF IN OPPOSITION

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I.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Should this Court review a decision of the Ohio Supreme Court when the only question presented by Petitioner is whether the Ohio Supreme Court misinterpreted the Ohio Constitution and the Ohio Rules of Civil Procedure?

II.

STATEMENT OF CORPORATE AFFILIATION

Scripps-Howard Broadcasting Company is a partially owned subsidiary of Scripps Howard, Inc., which is a wholly owned subsidiary of The E.W. Scripps Company. Affiliated companies of Scripps-Howard Broadcasting Company or its parent companies are: John P. Scripps Newspapers; Birmingham Post Company; CH Corporation; Cincinnati Post & Kentucky Post; Collier County Publishing Company; The Courier Company; The Denver Publishing Company; Evansville Courier Company, Inc.; Force V Corporation; Herald-Post Publishing Company; Knoxville News-Sentinel Company; Memphis Publishing Company; New Mexico State Tribune Company; Albuquerque Publishing Company; Pittsburgh Press Company; The San Juan Star Company; Stuart News Company; Sun-Tattler Company; United Media Enterprises, Inc.; United Feature Syndicate, Inc.; Newspaper Enterprise Association, Inc.; United Media Ventures, Inc.; TV Data, Inc.; Radix, Inc.; Dataway, Inc.; George R. Hall, Inc.; Hall Systems, Inc.; L-R Cable, Inc.; EWS Cable, Inc.; The Scripps Howard Foundation.

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No. 87-2025

IN THE

Supreme Court of the United States

October Term, 1987

ROBERT PEREZ,
Petitioner,

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Scripps-Howard Broadcasting Company and William Younkin respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the decision of the Supreme Court of Ohio in this case. That opinion is reported at 35 Ohio St. 3d 215 (1988).

JURISDICTIONAL STATEMENT

Respondents submit that this Court's jurisdiction is improperly invoked under 28 U.S.C. §1257(3) because Petitioner has raised no title, right, privilege or immunity set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

RULE INVOLVED

OHIO SUPREME COURT RULES

Rule 1. Supreme Court Opinions

(A) All opinions of the Supreme Court shall be reported in the Ohio Official Reports.

(B) The syllabus of a Supreme Court Opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the Court for adjudication.

(C) In a per curiam opinion of the Supreme Court, the point or points of law decided in the case are contained within the text of each per curiam opinion and are those necessarily arising from the facts of the specific case before the Court for adjudication.

STATEMENT OF THE CASE

A. Summary of Procedural History.

Petitioner filed this case in the Court of Common Pleas of Stark County, Ohio on October 31, 1980, claiming that he had been defamed by several broadcasts by Respondents. Because of the highly politicized nature of the case, each of the Stark County Common Pleas judges recused himself, and the matter was assigned to a visiting judge from outside the county. Following appropriate discovery, Respondents sought and the trial court granted summary judgment. Petitioner's opposition to Respondents' Motion for Summary Judgment addressed only one of the several broadcasts he had previously objected to, namely the broadcast that featured certain charges made by one Edward Ferren. Although the Petition for Writ of Certiorari refers to at least seven broadcasts, Petitioner has never pursued any claim regarding any of the other broadcasts during this litigation.

The decision of the trial judge granting Respondents' Motion for Summary Judgment (Petitioner's Appendix at A37-A40) was clear and straightforward and accurately stated Ohio defamation law. However, the three-judge panel of the local Court of Appeals for Stark County reversed the trial court's decision in an opinion that was replete with the court's own speculation about matters not contained in the Record. The appellate court's opinion also reflects a garbled and inaccurate concept of the law of actual malice, which focuses on such irrelevant and speculative issues as "possible" editing of the videotape;[1] rehearsing of statements before

[1] The claim in the Petition that there was "an unusual amount of cutting and piecing of the story" (Petition at 17) is emphatically not true. There is no Record reference to that claim because there is nothing in the Record to support it.

videotaping; the presence of other people during the taping; what the interests of those other persons might be; and what political allegiance Respondent Younkin might have. The opinion of the Court of Appeals never focuses on the attitude of Respondents toward the truth of the broadcast.

The Ohio Supreme Court in a clear and well-reasoned opinion reinstated the trial court's judgment and soundly rejected each of the confused theories of actual malice that appeared in the decision of the Court of Appeals.

Petitioner, having enlisted the assistance of new counsel, has now petitioned for review in this Court of an issue never raised by him in any of the courts below.

B. Statement of Facts.

The broadcast at issue in this case was one of a series of reports about questionable activities in Stark County government. The lawsuit was filed only days before the 1980 Stark County Sheriff's election, and about two weeks after the filing of a similar lawsuit by another Stark County Sheriff's Department official.

Reporter William Younkin, who prepared the broadcasts, had been investigating activities in Stark County for several months before this report aired (R. 243). Younkin was introduced to his principal source for this report, Edward Ferren, through a Stark County Deputy Sheriff who had been a reliable source of information for him in previous reports (R. 248). When they met, Ferren told Younkin that Petitioner Robert Perez, a captain in the Sheriff's Department, had proposed that he sell drugs, not as an undercover agent, but simply as a salesman for Perez (R. 275-277). Ferren told Younkin this twice on videotape. The transcript of

the videotaped interview is crystal clear that Ferren understood that he had been solicited to sell drugs illegally on behalf of Perez.[2]

Younkin tested Ferren's motivation by asking why he was willing to talk to him about this. Ferren said that it was not right that the police could do this sort of thing, while ordinary people who did would be in jail. Although Ferren feared for his personal safety, he said that he had decided to talk to Respondents because he felt they had demonstrated a willingness to tackle the "power structure" in Stark County (R. 250).

Respondents spent two weeks following the Ferren interview investigating his charges. Specifically, Respondents confirmed numerous circumstantial details of Ferren's story, including his claimed employment, the details of his minor criminal record, the fact he actually had been in jail at the time the solicitation by Perez occurred, and that he had been taken from his cell to Perez's office for a meeting during that confinement (R. 250-51).

Younkin repeatedly tried to reach Petitioner both at home and at work to get his response to the charges. Although Younkin left explicit messages as to why he was calling Perez, those calls were never returned (R. 251).

Younkin also spoke with other members of the law enforcement community in an effort to obtain further information about the charges; none of those he spoke with told him that the charges were untrue or unbelievable. He did learn from these law enforcement sources of several instances in which Perez had been

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[2] The complete text of the interview with Ferren which was broadcast by Respondents is included in Petitioner's Appendix at A2-A4.

given specific information about drug dealers, but had taken no action against them (R. 251-52). The same sources told Younkin that the Sheriff's Department had allowed Charlie Smith, a "con man" with a long criminal record who was friendly with several department members, including Perez, to take and resell illegal drugs that had been confiscated in department raids (*Id.*).

So-called "street people" and law enforcement personnel both told Respondents that drugs seized in raids by the Stark County Metropolitan Narcotics Unit, of which Petitioner was a ranking officer, were not being destroyed and were being resold on the street. Respondents investigated Stark County files and found no records of the destruction of seized drugs, although such records are routinely kept in other Ohio counties (R. 252-53).

There is no dispute that Respondents conducted this extended investigation before publishing. Moreover, Younkin's *unchallenged* testimony was that he believed the truth of the statements made to him by Ferren regarding Perez's solicitation to sell drugs illegally and that he believed that the broadcasts were true (R. 253, 259).

The broadcast at issue primarily consisted of charges made by Ferren himself on videotape. Twice thereafter Ferren reiterated that those charges were true. The first time was after a Sheriff's Department board of inquiry "cleared" Petitioner of any wrongdoing, when Ferren specifically stated on tape in another interview: "I stand by what I said." (R. 258). The second reiteration occurred in Ferren's deposition when he was asked and answered as follows:

Q. When you were being taped [by Mr. Younkin] did you tell him the truth to the best of your understanding at that time?

A. Yes.

(R. 319).

Neither the affidavit of Petitioner nor his deposition contradicts Ferren's testimony with regard to his conversation with Petitioner that was reported by Respondents.

No evidence contradicts Younkin's testimony that he found Ferren credible and believed him. In fact, during the five years that this case was pending in the trial court, Petitioner never took the deposition of any of the Respondents, nor made any effort to establish what Respondents had done in preparing the broadcasts. Petitioner introduced no evidence pertaining to Respondents' state of mind as to the truth of the broadcasts. The only evidence in the record as to Respondents' attitude toward the truth of the broadcasts is the detailed affidavit of William Younkin, which asserted unequivocally that he believed what was published was the truth (Petitioner's Appendix at A53).

REASONS FOR DENYING THE WRIT

I. PETITIONER FAILED TO RAISE OR PRESERVE THE PURPORTED CONSTITUTIONAL ISSUE REGARDING THE RIGHT TO A JURY TRIAL AND OPEN ACCESS TO THE COURTS WHICH HE HAS ASKED THIS COURT TO REVIEW.

Petitioner purports to raise a "constitutional" issue concerning denial of his rights under the Ohio Constitution to a jury trial and open access to the courts. This is the very first time that Petitioner has ever mentioned this issue. Because of this, he has failed to preserve the issue for review by this Court.

It has long been the rule of the Ohio Supreme Court that the syllabus of its decision contains the law of the case. *State ex rel. Donahey v. Edmondson*, 89 Ohio St. 93, 107-108 (1913). *See Beck v. Ohio*, 379 U.S. 89, 93, n.2 (1964).[3] Thus, the only matters decided by the Ohio Supreme Court are found in its syllabus. The syllabus of the Ohio Supreme Court in this case (at A1-A2 of Petitioner's Appendix) makes no mention of the purported constitutional issue Petitioner has attempted to raise in his Petition. Therefore, under Ohio law the Ohio Supreme Court did not pass on the issue in this case.[4]

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[3] This principle of law is also set forth in Rule 1(B) of the Ohio Supreme Court Rules for the reporting of opinions which states:

> The syllabus of a Supreme Court opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the Court for adjudication.

[4] In fact, the Ohio Supreme Court's opinion reviewed *in toto* reflects no mention whatsoever of the issue Petitioner seeks to raise here. There is no mention of Article I, Section 16 of the Ohio Constitution. There is no discussion of the right to a jury trial. There is no mention of *Anderson v. Liberty Lobby, Inc.* affecting the meaning of Rule 56 of the Ohio Rules of Civil Procedure.

This Court has consistently held that where the highest state court has failed to pass upon the question presented for review, it will be assumed that the omission was due to want of proper presentation of that issue in the state courts. *See, e.g., Exxon Corp. v. Eagerton,* 462 U.S. 176, 181, n.3 (1983); *Street v. New York,* 394 U.S. 576, 582 (1969). This rule is based upon sound policy, specifically the need to ensure a sound and accurate record, and the requirement that the state's highest court first actually decide issues presented to this Court for review. The rule requires that the petitioner demonstrate that the issue he seeks to raise in this Court was presented to and decided by the court below. *See Hill v. California,* 401 U.S. 797 (1971). Petitioner herein has not and cannot make such a demonstration.[5]

Since Petitioner has failed to raise, present or preserve the very issue he now seeks to have this Court review, the Court should deny his petition.

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[5] The Petition is devoid of any indication or record reference to when the question sought to be reviewed was first raised, how it was raised, etc. so as to demonstrate that this Court has jurisdiction, as required by Supreme Court Rule 21(h).

II. PETITIONER HAS FAILED TO ESTABLISH JURISDICTION IN THIS COURT OR ANY BASIS FOR DISCRETIONARY REVIEW BY THIS COURT.

Petitioner has failed to establish jurisdiction in this Court under 28 U.S.C. §1257(3); nor has he qualified for review under any of the criteria set forth in this Court's Rules for granting discretionary review when jurisdiction exists.

Under 28 U.S.C. §1257(3), a decision of the highest court of a state may be reviewed by this Court by writ of certiorari where:

> . . . any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Petitioner has asserted only that his right to a jury trial and free access to the courts guaranteed by provisions of the Ohio Constitution have been impaired. Petitioner has not raised any title, right, privilege or immunity under the Constitution, treaties or statutes of the United States. The interpretation of Petitioner's rights under the Ohio Constitution is a question to be decided by the Ohio courts, whose decisions on such matters this Court is bound to accept. *International Longshoremen's Ass'n, AFL-CIO v. Davis,* 476 U.S. 380, 387 (1986) (this Court has "no authority to review state determinations of purely state law"); *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n,* 426 U.S. 482, 488 (1976). By his own definition of the question presented for review, Petitioner has established that this Court has no jurisdiction to review this case.

Nor has Petitioner set forth any basis for this Court to exercise its discretion to review this case, assuming *arguendo* that it had jurisdiction to do so. Supreme Court Rule 17 specifies those circumstances under which the Court will grant discretionary review. Rule 17.1(a) deals with the review of federal appellate decisions, and is plainly inapplicable to this case. Rule 17.1(b) deals with the review of decisions of state courts of last resort which conflict with decisions of other state courts of last resort or federal appellate courts. Petitioner has not argued that any such conflict is presented by this case.

Rule 17.1(c), in relevant part, allows the review of state court interpretations of important questions of federal law which have not been, but should be, settled by this Court, or state court decisions regarding federal questions which conflict with this Court's decisions. Petitioner has not argued that the decision below involves any undecided federal issue, or that the Ohio Supreme Court decided any federal issue in conflict with the decisions of this Court. Accordingly, Petitioner has failed to establish any basis for review by this Court and the petition should be denied.

III. THE DECISION OF THE OHIO SUPREME COURT REQUIRES NO REVIEW BECAUSE IT PLAINLY REFLECTS THAT THE COURT CORRECTLY APPLIED WELL-ESTABLISHED PRINCIPLES OF OHIO AND CONSTITUTIONAL LAW TO THE SPECIFIC FACTS OF THIS CASE.

The decision of the Ohio Supreme Court in this case requires no review, since it merely reflects the proper application of several well-settled principles of Ohio and constitutional law to the facts presented. The court properly conducted an independent review of the entire record to determine whether the record as a whole established actual malice with convincing clarity. *Bose Corp. v. Consumers Union*, 466 U.S. 485, *reh'g denied*, 467 U.S. 1267 (1984). In conducting its review, the court relied on *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), for the proposition that a public official plaintiff's burden in a defamation action is to prove actual malice with clear and convincing evidence. Well-established Ohio law is in accord, and holds that a public official libel plaintiff must produce evidence sufficient to raise a genuine issue of material fact from which a reasonable jury could find actual malice by clear and convincing evidence to avoid a properly supported motion for summary judgment. *Bukky v. Painesville Telegraph & Lake Geauga Printing Co.*, 68 Ohio St. 2d 45, 428 N.E.2d 405 (1981). *Accord Scott v. News Herald*, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986); *Dupler v. Mansfield Journal Co.*, 64 Ohio St. 2d 116, 413 N.E.2d 1187 (1980), *cert. denied*, 452 U.S. 962 (1981).

The Ohio Supreme Court also correctly invoked the well-settled principle that the actual malice test focuses on the defendant's attitude toward the truth of the publication at issue. *E.g., Herbert v. Lando*, 441 U.S.

153, 160 (1979); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Unless the plaintiff can demonstrate that a publication was made with a high degree of awareness of probable falsity, or that the defendant entertained serious doubts about the truth of the publication, there is no proof of actual malice. *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *St. Amant*, 390 U.S. at 731.

Finally, the Ohio Supreme Court accurately observed that only factual disputes that might affect the outcome of the suit will preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).[6]

The decision below resulted from the proper application of the above well-settled principles of law to the Ohio Supreme Court's independent review of the entire record. Because Petitioner failed to present any clear and convincing evidence that Respondents believed they were not publishing the truth, or that they had acted in reckless disregard of the truth, the Ohio Supreme Court reinstated the trial court's entry of summary judgment.

The Ohio Supreme Court's decision recounts at length the efforts of Respondents to corroborate their information, and recognizes the obvious fact that such efforts are powerful evidence of the absence of actual malice—they reflect instead a commitment to finding the

[6] Petitioner's argument that *Anderson v. Liberty Lobby, Inc.* has somehow undercut his Ohio constitutional rights is mystifying, given the Ohio Supreme Court's reliance on *Liberty Lobby* solely for this point, which is hardly a novel one. Both Ohio and Federal Rule 56 have always provided that summary judgment should be granted if there is no "genuine issue as to any *material* fact." (Emphasis added.) *Liberty Lobby* makes explicit what was always implicit in the rule: a dispute of fact, the resolution of which cannot affect the outcome of the case, is not "material" and does not preclude the entry of summary judgment.

truth. The decision also specifically addresses each of Petitioner's arguments that he claims establishes actual malice, and explains why Petitioner is mistaken.

A review of the decision discloses that Petitioner tried to prove actual malice by relying on ambiguous facts or the alleged attitude of the Respondents toward people rather than toward the truth. As the Ohio Supreme Court recognized, that is not proof of actual malice. *See Time, Inc. v. Pape*, 401 U.S. 279, 290, *reh'g denied*, 401 U.S. 1015 (1971); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967).

Petitioner's other "proof" of actual malice is his theory that heretofore unposed and unanswered questions about what might have motivated Respondents to make the broadcast requires an examination into Respondents' thought processes and attitudes toward the truth of the broadcast. Petitioner had five years and all the tools of discovery available to him to make that inquiry. For whatever reason, he did not. Now he complains to this Court that the allegations of his Complaint "cannot be outweighed" by the specific statements contained in the detailed affidavit of Respondent Younkin which Petitioner dismisses as "self-serving." Simply reading Ohio Civil Rule 56(E) (Petitioner's Appendix at A44-45) demonstrates that Petitioner's argument is baseless.[7]

[7] It is ironic that Petitioner is complaining about the Ohio Supreme Court's interpretation of Rule 56 of the Ohio Rules of Civil Procedure when his own affidavit filed herein reflects a fundamental misconception of what Rule 56 requires. That affidavit is replete with inadmissible and irrelevant statements, including the statement that Petitioner "will produce evidence" that his reputation was damaged; that "other [unspecified] acts of the defendant" were equally "demeaning" to him; that the broadcast of the interview with Ferren "impl[ied]" it was spontaneous; and that the deposition of Edward Ferren proves not only "reckless disregard" but also "actual malice." (R. 290). Obviously, these are not "facts" that are "admissible in evidence" so as to preclude summary judgment. Ohio Civil Rule 56(E).

The Ohio Supreme Court properly sorted through Petitioner's jumble of misconceptions and irrelevancies and got to the heart of the matter. It announced no new rule of law, nor did it rely on *Anderson v. Liberty Lobby, Inc.*, for anything more than the incontrovertible proposition that only a dispute as to a *material* fact precludes the entry of summary judgment which is otherwise appropriate. Somehow, Petitioner has transmogrified that reference into a denial of his Ohio constitutional rights. His argument is utterly unsupportable.

Petitioner has presented no important legal issue to this Court for review. He simply wants to have this Court review the facts and reach a different conclusion than the Ohio Supreme Court reached. This Court does not grant certiorari merely to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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